A

DATO' TING CHEUK SII

v.

DATUK HJ MUHAMMAD TUFAIL MAHMUD & ORS AND ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA

C [CIVIL APPEALS NOS: Q-02-724-2007 & Q-02-729-2007]
7 NOVEMBER 2008

LEGAL PROFESSION: *Practice of law - Advocates and solicitors - Right of audience - Appeals before Court of Appeal sitting at Putrajaya*
D *against decision of High Court in Sarawak - Appellant represented by advocate of High Court in Malaya - Whether counsel had no standing to appear for appellant - Governing legislation - Advocates Ordinance (Cap 110) of Sarawak ss. 8, 10, 16 - Courts of Judicature Act 1964, s. 39 - Legal Profession Act 1976*

E

In these appeals before the Court of Appeal sitting at Putrajaya against the decision of the High Court in Sarawak, a preliminary question arose as to whether the appellant's counsel ('Mr. Thomas'), an advocate of the High Court in Malaya, could
F lawfully represent the appellant in the appeals. The respondents argued that Mr. Thomas could not – since – if the appeals had been posted for hearing in Sarawak, ss. 8, 10 and 16 of the Advocates Ordinance (Cap 110) of Sarawak ('the Ordinance') would have barred Mr. Thomas from so appearing.

G **Held (dismissing respondents' objection)**
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) It is clear from a collective reading of ss. 8, 10, and 16 of the
H Ordinance that only a person admitted to practice as an advocate at the High Court of Sarawak may appear before that court and the Federal Court when it sits in Sarawak to hear appeals from that State. Be it noted however that there is a glaring omission about the right of audience before this
I court in appeals arising from decisions of the High Court in Sarawak. Be it also noted that the Ordinance has no extra-territorial effect, and therefore does not apply to appeals that are posted for hearing within the States of Malaya. (para 3)

(2) As against the Ordinance, there is s. 39 of the Courts of Judicature Act 1964 which is a federal law having effect throughout the Federation. Considering the section, and the proviso thereof, it is clear that that section empowers the President of this court to direct it to convene a sitting anywhere within Malaysia and to direct any appeal to be heard anywhere within Malaysia. It follows that the President may direct an appeal against the decision of the High Court in Sabah and Sarawak to be heard by this court anywhere in the States of Malaya, which is what happened in the present instance. In such a case, the right of audience before this court is governed not by the Ordinance, but by the Legal Profession Act 1976. It is thus beyond dispute that Mr. Thomas has the right of audience before this court when it sits in Putrajaya. (para 5)

Bahasa Malaysia *Translation Of Headnotes*

Dalam rayuan-rayuan di hadapan Mahkamah Rayuan yang bersidang di Putrajaya terhadap keputusan Mahkamah Tinggi Sarawak di sini, satu persoalan awal telah berbangkit mengenai sama ada peguam perayu ('Encik Thomas'), seorang peguambela Mahkamah Tinggi Malaya, boleh di sisi undang-undang mewakili perayu di dalam rayuan-rayuan. Responden-responden berhujah bahawa Encik Thomas tidak boleh – oleh kerana – jika rayuan-rayuan ditetapkan untuk pendengaran di Sarawak, maka ss. 8, 10 dan 16 Ordinan Peguambela Sarawak (Cap. 110) akan menghalang beliau dari berbuat demikian.

Diputuskan (menolak bantahan responden-responden)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Adalah jelas dari pembacaan menyeluruh ss. 8, 10 dan 16 Ordinan bahawa hanya seseorang yang diterimamasuk untuk beramal sebagai seorang peguambela di Mahkamah Tinggi Sarawak sahaja boleh hadir dan berhujah di mahkamah tersebut dan Mahkamah Persekutuan bilamana mahkamah-mahkamah berkenaan bersidang di Negeri Sarawak. Apapun, barang diingat bahawa terdapat peninggalan ketara mengenai hak untuk hadir dan berhujah di mahkamah semasa dalam rayuan-rayuan yang berbangkit dari keputusan-keputusan Mahkamah Tinggi Sarawak. Harus juga diingat bahawa

A Ordinan tidak mempunyai kesan luar kawasan, dan kerana itu tidak terpakai kepada rayuan-rayuan yang ditetapkan untuk pendengaran di Negeri-Negeri Tanah Melayu.

(2) Selain dari Ordinan, terdapat juga s. 39 Akta Mahkamah
B Kehakiman 1964 yang merupakan undang-undang persekutuan dan terpakai ke seluruh pelusuk Persekutuan. Mengambilkira seksyen ini, serta provisonya, jelas bahawa seksyen tersebut memberi kuasa kepada Presiden mahkamah semasa untuk mengarahkan ia bersidang di mana jua di Malaysia dan
C mengarahkan supaya mana-mana rayuan didengar di mana-mana Negeri di Tanah Melayu, seperti yang berlaku dalam kes ini. Dalam keadaan sedemikian, hak untuk hadir dan berhujah di hadapan mahkamah semasa adalah dikawalselia bukan oleh Ordinan, tetapi oleh Akta Profesion Undang-Undang 1976.
D Oleh hal yang demikian, Encik Thomas jelas mempunyai hak untuk hadir dan berhujah di hadapan mahkamah ini apabila ia bersidang di Putrajaya.

Legislation referred to:
Advocates Ordinance (Cap 10) (Sarawak), ss. 8, 10, 16
E Companies Act 1965, s. 181
Courts of Judicature Act 1964, s. 39

(Civil Appeal No: Q-02-724-2007)
For the appellant - Tommy Thomas (George Lo, Robyn Choi, James Lo, C Sivasankar & Ting Cheng Ching with him); M/s George Lo & Partners
F *For the 1st, 5th, 6th, 8th & 9th respondents - Willian Yeo; M/s JM Lim & Co*
For the 2nd, 3rd, 4th & 7th respondents - Sim Hui Chuang (Lim Lip Sze with him); M/s Reddie & Co

G *(Civil Appeal No: Q-02-729-2007)*
For the appellant - Tommy Thomas (George Lo, Robyn Choi, James Lo, C Sivasankar & Ting Cheng Ching with him); M/s George Lo & Partners
For the respondents - Sim Hui Chuang (Lim Lip Sze & Willian Yeo with him); M/s JM Lim & Co

H *[Appeals from High Court, Kuching; Originating Petition Nos: 26-05-2006-II & 28-32-2006-II]*

Reported by Wan Sharif Wan Ahmad

I

JUDGMENT

Gopal Sri Ram JCA:

[1] There are two appeals before us. Both arise from the decision of the High Court in Kuching, Sarawak. One is directed against the order of the High Court dismissing a petition presented under s. 181 of the Companies Act 1965. The other is directed against the dismissal of a winding up petition. Both appeals were fixed before this court at its sitting at its principal Bench in Putrajaya on 8 October 2008. When they were called on, the appellant was represented by Mr T. Thomas, an advocate of the High Court in Malaya leading other advocates from Sarawak. The respondents were represented by counsel from Sarawak. At the outset, learned counsel for the respondents took objection to Mr Thomas representing the appellants. Having heard argument from both sides, we reserved judgment.

[2] The main – indeed the only argument – raised by the respondents in support of their objection is this. If these appeals had been posted for hearing in Sarawak, Mr Thomas would have no standing to appear for the appellants by reason of the Advocates Ordinance (Cap 110) of Sarawak ("the Ordinance"). Three sections of the Ordinance were prayed in aid of this argument, namely, ss. 8, 10 and 16. This is what they say:

> 8(1) Subject to subsection (2) and to section 9, advocates shall have the exclusive right to practice in Sarawak and to appear and plead in the Federal Court in Sarawak and the High Court, and in all courts in Sarawak subordinate thereto in which advocates may appear, and, as between themselves, shall have the same rights and privileges without differentiation:
>
> Provided that:
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> (a) the Attorney-General of the Federation and the State Attorney-General shall be entitled to the same rights and privileges as are enjoyed by the Attorney-General in the Courts in England; and
>
> (b) no advocate, other than the State Attorney-General, who has the rank of Queen's Counsel shall perform any of the functions which, in England, are performed by a solicitor and are not performed by a barrister; but any advocate who has the rank of Queen's Counsel shall not be precluded by virtue of anything contained in this Ordinance from continuing to

engage in partnership with another advocate by reason only that such last mentioned advocate performs any functions as aforesaid.

(2) Notwithstanding subsection (1), a person who is an advocate in Sabah or an advocate and solicitor in the States of Malaya may appear and plead before the Federal Court when sitting in Sarawak:

(a) when the Federal Court is exercising its original jurisdiction:

(i) if he is representing the Government of the Federation or of any State thereof;

(ii) if he is an advocate in Sabah and representing a person who is normally resident in Sabah;

(iii) [Paragraph (iii) deleted by Reprint Commisioner]

(iv) if he is an advocate and solicitor in the States of Malaya and is representing a person who is normally resident in the States of Malaya; or

(b) when the Federal Court is exercising its appellate jurisdiction, if the cause of action, the subject matter of the appeal, was tried:

(i) in Sabah, the advocate appearing is a Sabah advocate;

(ii) [Paragraph (ii) deleted by Reprint Commissioner]

(iii) in the States of Malaya, the advocate appearing is a States of Malaya advocate and solicitor.

10. Notwithstanding anything in this Ordinance contained:

(a) [Paragraph (a) deleted by F.L.N. 435 of 1965]

(b) any person who possesses any of the qualifications mentioned in subsection (1) of section 4 may, in the discretion of the Chief Justice and upon payment of the prescribed fee, be granted a temporary licence to practise notwithstanding that he does not fulfil any of the conditions mentioned in paragraph (c) of subsection (2) of section 4 if the Chief Justice is satisfied that such person intends to reside in Sarawak and practise in the place of any advocate whose name is on the roll and who has been practising in Sarawak for a period of not less than twelve months: a temporary licence shall not be granted for any period in excess of six months nor shall the period of its validity be expended beyond six months;

(c) the Chief Justice or in his absence from Sarawak a Judge may in his absolute discretion upon application by or on behalf of any person who possesses any of the qualifications mentioned in subsection (1) of section 4 grant permission to such person to practise in any one case or matter subject to any conditions he may think fit and to the payment of the prescribed fee if:

(i) such person has been instructed by a local advocate; and

(ii) having regard to all the relevant circumstances he is of opinion that it is in the interest of justice so to do.

[Paragraph (b) and (c) substituted for paragraphs (b), (c) and (d) by Ordinance 3 of 1960]

16.(1) Any person, not being entitled to practise in Sarawak under the provisions of this Ordinance, who:

(a) acts as an advocate or agent for suitors, or who as such advocate sues out any writ or process, or commences, carries on, solicits or defends any action, suit or other proceeding in the name of any other person, or in his own name, in any of the courts of Sarawak, or draws or prepares any instrument relating to any proceedings in any of the courts of Sarawak;

(b) wilfully and falsely pretends to be, or takes or uses any name, title, addition or description implying that he is, duly qualified to act as an advocate, or that he is recognised by law as so qualified; or

(c) either directly or indirectly for, or in expectation of, any fee, gain or reward, draws or prepares any instrument relating to immovable or movable property.

shall be liable to a fine of one thousand dollars.

(2) Nothing in section 8 or subsection (1) shall prevent any litigant in person, or any person having the right to appear under any rules of court or any other written law for the time being in force, from attending pleading and doing any act with regard to any proceeding in which he is a litigant in person, or in which he has a right to appear.

(3) The provisions of this section shall not apply to:

(a) the Attorney-General of the Federation, any State Attorney-General, State Advocate-General or Legal Adviser of a State, or any person acting under the authority of any of them;

A (b) any public officer drawing or preparing instruments in the course of his duty;

(c) any person employed merely to engross any instrument or proceeding;

B (d) any person who draws or prepares

(i) a will or other testamentary instrument;

(ii) an agreement under hand only;

C (iii) a letter or power of attorney;

(iv) a transfer of stock containing no trust or limitation thereof;

(e) any person who on behalf of an illiterate:

D (i) writes a petition or letter addressed to, or intended to come to the notice of, any public officer or court; or

(ii) completes any document or form prescribed by any written law.

E **[3]** It is clear from a collective reading of the foregoing sections that only a person admitted to practise as an advocate at the High Court of Sarawak may appear before that court and the Federal Court when it sits in Sarawak to hear appeals from that State. Be it noted that there is a glaring omission about the right F of audience before this court in appeals arising from decisions of the High Court in Sarawak. Be it also noted that the Ordinance has no extra-territorial effect. That is to say, it does not apply to appeals that are posted for hearing within the States of Malaya.

G **[4]** Now, as against the Ordinance, there is s. 39 of the Courts of Judicature Act 1964 which is a federal law having effect throughout the Federation. That section says this in reference to the sittings of the Court of Appeal:

H 39(1) The Court shall sit on such dates and at such places as the President may from time to time appoint:

Provided that the President may, when he deems it expedient, direct that any appeal be heard at any time and in any place in Malaysia.

I (2) The President may cancel or postpone any sitting of the Court which has been appointed under subsection (1).

[5] We consider the first subsection and its proviso to be relevant to the case at hand. As may be seen, it empowers the President of this court to direct it to convene anywhere within Malaysia and to direct any appeal to be heard anywhere therein. It follows that the President may direct an appeal against the decision of the High Court in Sabah and Sarawak to be heard by this court anywhere in the States of Malaya. This is what has happened in the present instance. In such a case, the right of audience before this court is governed, not by the Ordinance, but by the Legal Profession Act 1976. And it is beyond dispute that Mr Thomas has the right of audience before this court when it sits in Putrajaya.

[6] It follows from what we have said thus far that the objection taken cannot succeed. We would accordingly dismiss it. Given the circumstances in which the objection was taken we would make no order as to the costs of the proceedings thus far. Acting in accordance with the direction of the President, we direct the registrar of this court to re-fix these appeals on an early date. Counsel shall attend before the registrar and obtain a suitable hearing date.